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BEFORE THE SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS

By

E. I. DU PONT DE NEMOURS AND COMPANY

In accordance with the Notice of Proposed Rulemaking (NPR) served on October 3, 2000, these Comments are submitted on behalf of E. I. du Pont de Nemours and Company ("DuPont"). DuPont appreciates the opportunity to comment in response to the Board's October 3 decision and NPR in this proceeding. As mentioned in our March 8 comments in Ex Parte No. 582, and May 17 comments in this proceeding, the U.S. rail industry is clearly at a crossroads where the future is uncertain, the ground rules must change, and the status quo is no longer acceptable.

The NPR is an historic opportunity to reshape and reinvigorate the future of rail transportation in North America. The Board has been wise in recognizing the need to consider new policies that would "enhance, rather than simply preserve competition." DuPont, once again, encourages the Board to apply this new competitive thinking in a broad way to the entire railroad industry, rather than confine its application to merely the next merger application. The industry has already concentrated to such a degree that broader competitive remedies are needed.

DUPONT OVERVIEW

DuPont is a $26 billion diversified chemical and life sciences corporation with over 200 manufacturing sites and almost 100,000 employees worldwide. Rail transportation is critical to DuPont's domestic and export business, and is for many of our chemical products the only safe and practical mode of transportation. Each year, DuPont and its affiliates ship in excess of 70,000 rail shipments, representing over $220 million in railroad freight revenue, in a private fleet of over 9,000 rail cars. More importantly, these shipments are the fundamental basis of DuPont's diverse global supply chains, and directly produce $5.5 billion of North American sales and exports. 75% of this has no other transportation alternative, either because of safety considerations or sheer volume. As the railroad industry has consolidated in recent years to four major territorially dominant railroad systems that control over 90 % of all U. S. rail traffic, DuPont has found it's options for improved service and competitive choices virtually eliminated. Despite DuPont's size and resources, 80% of its rail transportation involves sites that are captive to a single railroad. While rates at such "captive" facilities are typically 15-30% higher than for similar facilities served by two or more competing railroads, DuPont's major concern is that there is little incentive for railroads to provide excellent service. More importantly, there are no viable alternatives if and when safety or service falter.

At DuPont, we believe that *safe, reliable, and efficient transportation at a competitive cost is critical to our business success.* With a heritage of nearly 200 years committed to the safe manufacture, transport and distribution of its products, DuPont has long been recognized as a leader in safety. Our corporate policy states that DuPont will only manufacture, distribute, and transport materials and product which can be safely handled, transported, stored and used by its employees, distributors, and customers. Our reputation, indeed our very license to operate is at stake. Further, rail service continues to be disappointing, despite years of cooperative work with the railroad industry on programs such as for Interline Service Management. Today, because of the increased concentration and the regulated framework governing the industry, rail customers cannot disqualify carriers who do not perform. We need the ability to select carriers based on safety and service performance, and to divert business away from carriers who do not perform.

GENERAL

DuPont commends the Board for recognizing that new railroad merger rules are needed, and that these rules should "enhance" as well as simply preserve competition. DuPont supports the Board's proposed policy goal of ensuring "balanced and sustainable" competition. As the Board acknowledges, the existing rules have created a pro-merger bias that has led to four major territorially dominant railroad systems and to the current imbalance in market power between railroads and their customers. The new rules as proposed broadly address many of the issues that have concerned rail customers. We encourage the Board to develop additional specificity during this rulemaking so that the new rules are clear and do not simply discourage formal mergers, while encouraging other forms of rail combinations that could be equally anti-competitive.

DuPont is disappointed, however, that Board does not address the resulting concentration and loss of competition that already exists. For captive carload customers, maintaining the status quo through now tightening the rules is not an acceptable outcome. DuPont is not necessarily opposed to rail mergers, as long as the new combinations bring improved service and efficiency. Unfortunately, most mergers in recent years have simply reduced competitive options while yielding to-date little apparent customer or public value.

While DuPont would have preferred that the Board address competition in a broader way, we will nevertheless comment on the new rules as they have been proposed.

DUPONT SUPPORTS THE FOLLOWING ELEMENTS OF THE NPR

As noted previously, DuPont endorses the Board's policy goal of ensuring "balanced and sustainable" competition, and in particular for requiring applicants to include in their filing a plan for enhancing competition. We are pleased to see the Board adopt permanently the five-year oversight period and requirement to establish a Service Council. Both processes were appropriate and helpful in the Conrail merger and should be incorporated in the new regulations. The additional requirement of a Service Assurance Plan for major mergers is also welcome. The Safety Integration Plans required by the Board during Conrail transaction helped insure that safety was not compromised during implementation despite the well-known operating and computer problems. Had such Service Assurance Plans been in place the transition might have gone much smoother. In particular, we note that these plans are to include contingency procedures for addressing claims which has been a contentious issue for rail customers in the past two mergers. Incorporating this concept in the Service Assurance Plans is a powerful incentive for merging railroads to be thorough in their implementation planning. Such procedures must allow for recovery of not only premium transportation costs, but also consequential damages for such costs as lost production, excess labor, etc.

DuPont enthusiastically supports the proposal to protect existing gateways, maintain options for build-in/build-outs, and prevent new "bottleneck" situations. Requiring merger applicants to address these points is fundamental. This has been a shortcoming of past merger policy, and is a primary reason DuPont feels that broader competitive reform dealing with the entire industry, rather than just the next two merging railroads, is now required.

DuPont also supports the Board's proposed new approach of requiring applicants to address "Cumulative impacts and crossover effects" of potential downstream mergers that could result. This change is critical as the industry approaches a final stage of consolidation. While we have stated several times that DuPont desires a broader approach to expanded competition, this provision does offer a potential mechanism to impose competitive conditions or alterations that become effective upon a subsequent downstream merger. If crafted carefully, such later changes might be a vehicle to expand competition in way that is not punitive to the initial merger applicants. However, DuPont continues to believe that the existing competitive environment must be addressed even if there are no future mergers.

DUPONT RECOMMENDS THE FOLLOWING CHANGES TO THE NPR

The concept of ensuring "balanced and sustainable" competition, while laudable, requires clear definition - particularly as it applies to captive rail customers. For many chemical industry facilities, there is no competition - balanced or otherwise. Many factors, such as safety, environmental concerns, sheer economies of scale, and availability of equipment preclude the use of trucks for other than brief emergencies. "Balanced and sustainable" competition for chemical companies means rail-to-rail competition that allows for choices, alternatives, and incentives to perform. It is this singular absence of real competition that permits today's poor rail service, and causes railroad customers to seek legislative remedies. We are concerned that the discussion of proposed Section 1180.1 (c) and the consideration of the public interest in "enhanced competition" does not include a specific requirement (as distinct from an expectation) for enhanced rail-to-rail competition. Such enhancement must not only be a goal, but a specific component of rail mergers. The proposed language seems to suggest that access to a second carrier to allow "balanced and sustainable" competition is unlikely - even if it is safe, operationally feasible, and does not endanger the operational and financial success of the merged railroad. This further suggests continuing the status quo with respect to terminal access and trackage rights, and is at odds with the original intent of the Staggers Rail Act.

Moreover, the discussion of proposed 49 C.F.R. § 1180.1(d), regarding the Board's policy for imposing conditions, seems to imply that if "enhanced competition," particularly rail-to-rail competition, is not proposed by the applicants, it will not be imposed as a condition by the Board. The Board should make it clear that proposed conditions for enhanced rail-to-rail competition must be considered and imposed if they meet the public interest standard, and the requirements of 49 U.S.C.A. § 11324(c).

To ensure that "balanced and sustainable" competition truly exists, Section 1180.1 (c) (2) "Potential harm" must be strengthened such that merging rail carriers are required to provide a bona fide rate (not restricted to a contract) for any new potential bottleneck segments of their combined system. If agreement on a reasonable rate for a bottleneck segment cannot be reached between the railroad and its customer, DuPont suggests establishing "baseball" type arbitration as an alternative process for such situations. Similarly merger applicants should be required to address how they will allow for enhanced terminal area reciprocal switching and trackage rights to balance increased market power. Another reason that DuPont strongly prefers a broader approach to competitive remedies is that conditions applied to merger applicants alone will put them at a competitive disadvantage versus other railroads. Another way this could be accomplished is using the 5-year oversight process on previous mergers to "balance" the competitive remedies required for the new merger.

If such broad and mutually fair remedies of the competitive environment are not developed, it will surely drive railroads to other forms of business combinations, such as marketing alliances - which are currently viewed by the Board as outside its jurisdiction - in lieu of mergers. Such alliances have the potential to bring the same monopolistic effects as major mergers, but without regulatory oversight by either the Board or the antitrust laws. The Board needs to address such an outcome in the new rules.

While we are pleased to see 5-year oversight incorporated in the new rules as mentioned above, some form of continuing oversight of competitive effects is needed to ensure that commitments made by the merging carriers for enhancing competition, preserving gateways and avoiding new bottlenecks are "sustainable" after the 5-year period.

The new Section 1180.1 (k) "Transnational issues" is very appropriate now that Canadian and Mexican railroads are becoming so closely intertwined with U.S. railroads. A common regulatory framework, compatible operating practices, and a mutual understanding of transnational issues are needed throughout North America. However, DuPont would prefer that the Board approach this in a more proactive way by establishing a dialogue and ongoing forum with Canadian and Mexican governmental agencies to pursue this goal. Such coordination of policies is needed even if no future mergers occur.

SUMMARY

In summary, DuPont continues to believe that broad changes are needed in the railroad/customer competitive balance if the Board's vision of "balanced and sustainable" competition is to be achieved. Further, DuPont questions if new merger rules alone are the appropriate way to accomplish this now that the Railroad industry has concentrated essentially to two monopoly-like railroad systems in each half of the U.S. However, the Board has in this rulemaking made an excellent start in recognizing and attempting to address the anti-competitive effects of large railroad merger. We encourage the Board to continue to add specificity to the rules, strengthen the competitive remedies and broaden their application.

In addition, DuPont is familiar with the Comments being filed in this proceeding by the American Chemistry Council, the Alliance for Rail Competition and The National Industrial Transportation League, and generally supports those comments as well.

DuPont, as stated in our March 8 and May 17 comments, continues to suggest two alternative approaches to enhancing competition in ways that are "broad and sustainable".

First, DuPont assumes that the Board continues to believe that it does not currently have the statutory authority to apply remedies that increase competition where it does not already exist, and thus to resolve the existing competitiveness issues that have led to this NPR. DuPont once again encourages the Board identify and seek those specific legislative changes needed to enhance competition in this new and changing railroad environment.

Second, while private solutions may not offer an obvious alternative to this NPR, we continue to encourage the Board to seek opportunities to use its influence to bring railroads and their customers together to dialogue and jointly develop a long-range solution for the industry. This would be consistent with the Board's often-stated preference for private solutions. Such a solution would have to provide expanded competition and value for rail customers, create new market opportunities and growth for railroads, and allow for constructive mergers that bring real value to rail customers

As we have often stated, safe, reliable and predictable rail transport at a competitive price is essential if DuPont and other domestic manufacturers and producers are to most effectively serve their U.S. and global customer bases. It remains our belief that the best way to achieve these goals in the rail industry is through the unleashing, to the maximum extent possible, of competitive and natural market forces.

A rail system left to operate with little in-kind competition is not in the best interest of either the customers or the railroads. DuPont believes that this absence of direct rail-to-rail competition is a primary reason that railroad service has not improved in recent years and the railroad transportation market continues to shrink as a percent of the total.

Today's competitive global marketplace requires all elements of a supply chain to work together to produce the highest quality products demanded by the customer at the lowest practical cost. Manufacturers, suppliers, transportation providers and the government must each fulfill their obligations to ensure that this nation's citizens continue to enjoy the highest standard of living of any country in the world. While the specter of competition may be frightening to those who have enjoyed the luxury of not competing, in the end, however, DuPont believes that in-kind competition will ultimately give us a safer and more robust rail industry and a healthier U.S. economy.

DuPont, for its part, welcomes the opportunity afforded it by the Board to contribute to this rulemaking process. We look forward to an on-going role in achieving the proper balance of competition in the rail industry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of November, 2000, served a copy of the foregoing Comments upon all parties of record, via first-class mail, in accordance with the Board's decisions in this proceeding and the Rules of Practice.

Frederic L. Wood

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